a system costs money. Brain work creates it; and that brain work, and necessary incidental expenses, must be paid for. In the second place, since the organization, when completed, is a recognized permanent instrument of production, the necessary cost of perfecting it is part of the capital expenditure. Proof of this is found in the fact that it does not, like an operating expense, produce an immediate return, but goes into something permanent which without additional outlay brings in its return year after year — the distinguishing characteristic of capital expenditures.

Such going value, then, seems clearly an element of capital charge. But in estimating it a difficulty arises from the fact that the expense of acquiring it includes portions of the salaries of employees, which are charged to operating expenses. How shall the amount of salaries which has gone to acquiring this going value be determined? It is best done by adopting a system which takes into consideration the period of time, during the building up of the system, in which the original capital lay unproductive — a loss which is clearly an element of the cost. The investors who place their money in an enterprise which they know will not give them a fair return until a system is perfected, put into the investment during these first years the amount of money which they would have received as interest or profit on their capital in another business. To that amount, under normal circumstances, the plant's present cost-value is increased, that is, in addition to the physical materials, the plant has cost the use of the capital during the unproductive period.[6] This includes the cost of personal services in constructing the organization, because that amount which has been charged to operating expenses has to that extent cut down the theoretically justifiable profits.

One more matter must be noted as to the estimation of a plant's going value. In all matters of valuation, the figures taken represent the present cost-value, not the actual cost-value. Thus, if poor management made the physical plant cost more than it should, the company can fix its present cost-value only at what it should be, not at what it actually cost the company to acquire it. So it is with going value. Its present cost-value must not be fixed with reference to the actual facts. A hypothetical plant, built simultaneously with the existing one, must be taken as the criterion, and the present cost-value of its operating system, i. e. its going value, found. In the principal case, it would seem that the present cost-value of the going value was computed solely with reference to the existing plant; and in this respect the case seems objectionable.

PRIVILEGE IN PETITIONS FOR PARDON.— Privilege in the law of libel and slander is of two kinds: that which is defeasible by proof of malice, and that in which malice or wrong motive is not considered. To allow

[6] The analogy of interest during the physical construction of the plant is helpful. The sum that the capital would have earned at a fair interest (query, whether this should not be at a fair profit) during the construction period is added to the capital, for the plant has cost the use of the capital during this period. Long Branch Commission *v.* Tintern Manor Water Co., 70 N. J. Eq. 71, 62 Atl. 474; Pioneer Tel. & Tel. Co. *v.* Westenhaver, *supra.*

the defense of absolute privilege is in effect temporarily to deprive the libeled party of all protection from defamation. The justification must rest on the principle that where the demands of the public welfare and the right of the private individual conflict, the latter must yield.[1] But the hardship on the victim of the defamation and the opportunity for abuse require the privilege to be narrowly restricted. Communications made in the course of, and with reference to, judicial proceedings illustrate the reasons for the immunity. The object is to eliminate from the speaker's mind the fear of vexatious litigation, or even of damages at the hands of a jury who may mistake apparent for actual malice, which might deter him from saying what the court wants to hear.[2] Judicial officers are protected to assure the independence of the judiciary.[3] Party, counsel, or advocate, in what is spoken or pleaded, are privileged on the ground that the law seeks to give every litigant a chance to have his case fearlessly presented.[4] The immunity to witnesses is further necessitated because of the inherent difficulties which at best attend extracting the truth from their testimony.[5] It will thus be seen that in each case the policy in favor of immunity is very strong. The American cases tend to apply the principle more narrowly than the English, as is shown by the requirement that the pleadings be relevant.[6] But a recent case treats as absolutely privileged a petition to a state governor for pardon. *Connellee* v. *Blanton*, 163 S. W. 404 (Tex. Civ. App.). The result is reached on the ground of the analogy to pleadings in civil actions, and to petitions and memorials to legislatures, and on the further ground that the state constitution especially guaranteed the right to apply for redress of grievances.

The power to pardon offenses against the state is usually given to the governor by the state constitution. The power was originally thought of as an attribute of the English sovereign. And its perpetuation in the United States seems justified as a sort of supplemental machinery, required by the rigidity of criminal procedure, to relieve those who, though technically guilty, may be morally innocent or meritorious.[7] Pardons issue of grace, not of right. And a petition merely sets forth considerations calculated to convince the executive that clemency should be exercised. The peculiar reasons making pleadings privileged seem lacking. Since the litigant in court is conceived to have a *right* to have his claim decided in accordance with certain legal principles, he is given unrestricted opportunity to make full disclosures. The petitioner for pardon, on the other hand, is only entitled to appeal

[1] See BOWER, CODE OF ACTIONABLE DEFAMATION, 362

[2] See Dawkins *v.* Lord Rokeby, L.R. 7 H. L. 744, 755.

[3] Scott *v.* Stansfield, L. R. 3 Ex. 220. In the days when the independence of the English judiciary was not thought important, the privilege seems nevertheless to have been sustained on the peculiar ground that the king could not with propriety object to what he himself said through the medium of one of his judges. See BOWER, CODE OF ACTIONABLE DEFAMATION 373.

[4] Munster *v.* Lamb, 11 Q. B. D. 588.

[5] Seaman *v.* Netherclift, 2 C. P. D. 53. The further explanation has been suggested that since the witness is compelled by *subpœna* to testify, he should not be punished for an innocent attempt to comply. See Dawkins *v.* Rokeby, L. R. 8 Q. B. 255, 267.

[6] See 23 HARV. L. REV. 645.

[7] See 26 HARV. L. REV. 644.

to the governor's discretion; there is no right to a correct decision. Again, unrestrained disclosures seem relatively unimportant in a petition for pardon, since, unlike the case of an action where there are pleadings, the petitioners may, without amending their petition, bring forward further grounds for clemency; and the executive in deciding whether to grant immunity is not confined to a consideration of the facts and reasons adduced by the petitioners. Furthermore, this informality may make such petitions a mere cloak for libel, whereas judicial proceedings would not be instituted for the sole purpose of inserting a libel in the pleadings. As to the analogy relied on to memorials to legislatures, such petitions, by the better view in America, are only absolutely privileged when they become a part of the legislative proceedings.[8] The clause in the Texas Constitution would not seem to change the situation, for it only assures the right to file the petition, not to have an adjudication.[9] And the ever increasing facilities for disseminating what is published seems a further argument to reënforce the policy against extending the privilege.

RIGHT OF CORPORATION TO PURCHASE ITS OWN STOCK. — No subject presents greater conflict on the authorities than the right of a corporation to purchase its own shares. While the majority of American decisions permit corporations to do this, provided the rights of creditors are not involved,[1] the English authorities and a substantial minority of the American courts hold such transactions *ultra vires*.[2] They argue that such a power is not one which it is necessary that the corporation should possess to carry on its business satisfactorily. A number of the jurisdictions following this view, however, have held that the receipt of shares in satisfaction or as security for an indebtedness is quite within

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[8] See Cook *v.* Hill, 3 Sandf. (N.Y.) 341. In England the early case of Lake *v.* King, 1 Saund. 131 a, is said to have established the principle that petitions to Parliament are absolutely privileged. See ODGERS, LIBEL AND SLANDER, 3 ed., 209. And the same was held still earlier of a petition to the Queen. Hare and Mellers Case, 3 Leon. 138, 163. Both of these early cases seem to proceed on the theory that Parliament and the Crown are part of the judicial system of England. They furnish, therefore, no analogy for petitions to American legislatures.

[9] Art. 1, § 27, "The citizens shall have the right in a peaceable manner, to assemble together for their common good, and to apply to those invested with the power of government for redress of grievances or other purposes, by petition, address, or remonstrance." It should be observed that peculiar provisions in a state constitution, creating a Board of Pardons and providing for formal applications and hearings, may substantially amount to forming a separate judicial tribunal. Keenan *v.* McMurray, 34 Pitts. Leg. J. N. S. 223.

[1] Hartridge *v.* Rockwell, R. M. Charlton (Ga.), 260; Dupee *v.* Boston Water Power Co., 114 Mass. 37; Chicago, etc. R. Co. *v.* Marseilles, 84 Ill. 643; Porter *v.* Plymouth Gold Mining Co., 29 Mont. 347, 74 Pac. 938; Fremont Carriage Mfg. Co. *v.* Thomsen, 65 Neb. 370, 91 N. W. 376. But note that while *ultra vires*, the transaction is not so objectionable as to justify *quo warranto* against the corporation. State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020.

[2] Trevor *v.* Whitworth, L. R. 12 A. C. 409; Maryland Trust Co. *v.* Nat. Mechanics Bank, 102 Md. 608, 63 Atl. 70; Wilson *v.* Torchon Lace & Mercantile Co., 149 S. W. 1156 (Mo.); Coppin *v.* Greenlees & Ransom Co., 38 Oh. St. 275; German Savings Bank *v.* Wulfekuhler, 19 Kan. 60.